No. 12,537

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

HAROLD WIBYE,
Appellee.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellant's Statement of the Case is substantially correct, but it is incomplete, and also incorrect in one important particular referred to below. The trial Judge more fully stated the facts material to the appeal(25)[1] and accordingly, we summarize his statement, making such additions as we believe may be

[1]Numbers in parentheses refer to the Transcript of Record.

helpful (indicated by references to the Transcript of Record).

Appellees were seriously and permanently injured when a government car driven by John E. Hadley crashed into the automobile in which they were driving. Hadley was a civilian employee of the Stock Control Division of the United States Quartermaster Corps.

His duties required him to travel up and down the West Coast in a government automobile, visiting various Quartermaster Depots and performing certain work there. His itinerary for November, 1946, the month in which the accident occurred, was introduced in evidence as Plaintiff's Exhibit No. 22 (201-203). It showed that it was Hadley's duty to proceed from Seattle, Washington to the Stockton Quartermaster Depot at Lathrop, California, and to spend several days there. As it turned out, he had to spend two additional days at Lathrop to complete his work (156), at the conclusion of which he was required to drive back to Fort Lewis, Washington, near Seattle. He was scheduled to arrive there on November 11, 1946.

On Thursday, November 7, Hadley telephoned from Lathrop to his mother in San Francisco informing her that he had not been able to finish at Lathrop on Wednesday as planned, but that he would be through on Friday, the eighth, would leave Lathrop on that day, and return to Fort Lewis via San Francisco. He arranged to have dinner with his mother on Friday

in San Francisco, where he also had business with the Finance Office. Appellant refers in its Statement to the "Finance Company", and in its Conclusion treats Hadley's business in San Francisco as being with a private concern, rather than with the Government. Reference to the entire testimony makes it clear that "Finance *Office*" was intended, not "Finance Company." (157-161). The error originated in the question of trial counsel for appellant (161) and should not be perpetuated here.

At about 4:40 p.m. on Friday, November 8, 1946, Hadley was driving on Highway 50 near Dublin, Alameda County, enroute from Lathrop to San Francisco. At that time his car careened onto the wrong side of the road and crashed into the car in which appellees were riding. Hadley was instantly killed, death being caused by shock and hemorrhage due to fractures and internal injuries (140-141). The testimony of Harold Wibye as to the manner in which Hadley swerved across two lanes was corroborated by the investigating officer from the physical facts and the tire and skid marks left by both automobiles (125-132).

It was stipulated that Hadley was an employee of the United States at the time of the accident, that the car he was driving was a United States vehicle, that he was *authorized* to use the car in accordance with his itinerary, and that he was going to drive back with it to Fort Lewis, in accordance with this itinerary (205-206).

It is approximately 900 miles from Lathrop to Fort Lewis and at the time of the accident Hadley had proceeded only a short distance on the long trip. The route through San Francisco, which he elected to take, is approximately 60 miles longer than the inland route from Lathrop through Sacramento to Seattle. No specific travel route was prescribed for Hadley by the government. The route he was pursuing would take him to Fort Lewis without the necessity of retracing any of the distance covered and without the necessity of returning to the inland route (28).

QUESTIONS PRESENTED.

The only issues presented by this appeal are whether the findings that Hadley was negligent and was acting within the course and scope of his employment are clearly erroneous. We believe the mere statement of the case fully demonstrates that they are not, but on the contrary, are clearly correct.

I.

THERE WAS AMPLE EVIDENCE OF HADLEY'S NEGLIGENCE.

The trial Judge found that Hadley was negligent and that his negligence was the proximate cause of appellees' severe injuries (34).

Obviously this finding cannot be set aside unless "clearly erroneous" [F.R.C.P., (Rule 52(a)] and ap-

pellant is required by Rule 20(d) of the Rules of this Court to "state as particularly as may be wherein the findings of fact . . . are alleged to be erroneous."

Appellant has failed to meet the burden placed upon it. The finding of negligence is not only not clearly erroneous but, on the contrary, is amply supported by all of the evidence. That evidence establishes a *prima facie* case of negligence under the law of California, which clearly controls such matters in suits of this kind. [28 U.S.C.A. § 1346(b)].[2]

It is established beyond question in California that:

> "The presence of appellant's car on the wrong side of the highway was in itself *prima facie* evidence of negligence and called for explanation on his part." (*Jolley v. Clemens* (1938) 28 C.A. 2d 55, 68, 82 P. 2d 51.)

Accord:

Temple v. DeMirjian (1942) 51 C.A. 2d 559, 561, 125 P. 2d 544;

Musgrove v. Zobrist (1947) 83 C.A. 2d 101, 103-4, 187 P. 2d 782;

Parker v. Auschwitz (1935) 7 C.A. 2d 693, 696, 47 P. 2d 341;

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[2]The solution to the questions raised by the government's attack on the findings as to negligence are not to be disposed of only by the weight to be accorded findings by Rule 52, "but also on the substantive law of negligence as declared by the statutes and courts of California. Under California law, the question of negligence is, ordinarily, one of fact for the determination of the trier of fact. And this is true whether the inference of negligence is based on conflicting testimony or *is derived from undisputed facts from which inferences may be drawn.*" *U.S. v. Fotopulos* (C.A. 9, 1950), 180 F. 2d 631, 636 (Italics in the original).

Shurtleff v. Wynns (1931) 114 C.A. 653, 655, 300 P. 890.

Such evidence stands as proof of the fact of negligence when unrebutted.

Lawrence v. Goodwill (1919) 44 C.A. 440, 449, 186 P. 781.

Indeed, as established by the above authorities, driving on the wrong side of the road is negligence as a matter of law.

The facts of the present case are even stronger than those of the cases cited. As stated by the trial Judge on appellant's motion for judgment,

> "I don't think there is any [substance to] the point that there hasn't been any proof of negligence; that is, a prima facie case of negligence has been made. You wouldn't want any clearer case." (139-140).

This is a clear and accurate statement of the California law. Indeed, we believe it is fair to say that appellant did not seriously argue the issue of negligence in the trial Court (see 139-140). That was the trial Judge's view, for his opinion states that it is undisputed that plaintiff's injuries were caused by Hadley's negligence (26). Appellant has not taken issue with that statement.

In the face of these facts, the settled California law and traditional rules of appellate review, appellant nonetheless treats the question as though it were an original proposition. Its brief speaks of burden

of proof and presumptions and asks "Would the conclusion be, as a matter of law, that he [Hadley] unavoidably lost control and the accident was unavoidable on his part?" (App. Op. Br., pp. 5-6). The trial Court said "No", and we believe we have demonstrated the correctness of that answer. Inferences to be drawn from the evidence are properly left to the trial Court and may not be disturbed on appeal unless wholly unreasonable.

> "The sole question for us to determine is whether there was substantial evidence to support the findings in the plaintiff's favor. In answering that question we must take as true all facts which the . . . evidence tends to establish and draw in his favor all inferences fairly deducible from such facts." (Citations)
>
> "Where two different conclusions may reasonably be drawn from uncontroverted evidence, the question as to which should be drawn is for the trial court and not for the appellate tribunal." (Citations) (*U.S. v. Ingalls* (App. D.C., 1940) 114 F. 2d 839, 840, 842.)

Accord:

U. S. v. Fotopulos (C.A. 9, 1950) 180 F. 2d 631;

Melville v. State of Maryland (C.C.A. 4, 1946) 155 F. 2d 440;

Hamilton v. Pac. Elec. Ry. Co. (1939) 12 C. 2d 598, 86 P. 2d 829.

Whether or not Hadley negligently fell asleep at the wheel, leaned over to roll up the right window,

day-dreamed, or had his attention diverted, cannot be known with certainty. Those possibilities, however, are more probable in the ordinary course of human events than that he unavoidably lost control of the car. Under all the facts and circumstances of the case, and in view of the *prima facie* showing of negligence made by the presence of the car on the wrong side of the road, the trial Judge was clearly entitled to determine as a factual matter that the accident was not unavoidable, but the direct result of Hadley's negligence.

II.

THERE WAS SUBSTANTIAL EVIDENCE THAT HADLEY WAS ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

It is appellees' position, and that of the trial Judge, that Hadley was authorized to return to Fort Lewis via San Francisco, and that at the time of the accident he was attending to his employer's business, as well as his own, and thus was within the scope of his employment.

The trial Judge found that Hadley was acting within the course and scope of his employment when he negligently injured appellees (33-34). Thus, appellant is again faced with the task of showing such finding to be clearly erroneous. As held by this Court,

> "As the Congress, in waiving this immunity [under the Tort Claims Act], chose to deprive the litigants of the right of trial by jury,

> 28 USCA § 2402, the findings of a trial judge in a case of this character, take on a greater significance than in an ordinary civil tort action. * * * [Rule 52] requires us to give due weight not only to conclusions drawn by the trier of facts from contradictory testimony, but also to inferences made from testimony which does not stand contradicted directly, but the validity of which is impugned by * * * legitimate inferences from admitted facts (citing cases). * * *
>
> "[T]he trial court having made [inferences], any attempt on the part of the appellate court to 'draw an inference of fact constitutes a usurpation of the province of the trial court'. And this 'notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict.' " (Citing cases.)
>
> *U. S. v. Fotopulos* (C.A. 9, 1950), 180 F. 2d 631, 634, 635.

It could not be seriously contended that Hadley would have been beyond the scope of his employment had he planned to dine with a sister directly along the inland route to Fort Lewis. It is thus clear that the basis of appellant's argument is not Hadley's dinner plans, but his choice of routes. Accordingly, the many cases cited by appellant for the rule that an employee may not use his employer's car to go to meals are not in point (App. Op. Br., pp. 10-11). And the trier of fact found that Hadley had authority to choose between the two main routes of return (28). Appellant does not show wherein this finding was erroneous.

Appellant's argument seems to be based on the assumption that Hadley was *prohibited* from returning to Fort Lewis via San Francisco. Yet, all instructions which may have been given Hadley by his superiors were peculiarly within appellant's knowledge. From appellant's failure to produce any evidence concerning them, it may properly be inferred that such evidence would have been unfavorable to appellant [*Mid-Continent Petroleum Corp. v. Keen* (C.C.A. 8, 1946) 157 F. 2d 310, 315; *The Joseph B. Thomas* (N.D. Cal. 1897) 81 F. 578, 583, discussing cases; *Leenders v. C.&H. Sugar Refining Corp.* (1943) 59 C.A. 2d 752, 139 P. 2d 987; 2 Wigmore on Evidence (3d ed.) § 285], i.e., that Hadley was not prohibited from returning via San Francisco, or was specifically authorized to do so, or, what is the same thing, that nothing was said, leaving the choice of routes to his discretion.[3]

At all events, the trial Court concluded from the evidence introduced by appellees that "no specific travel route was prescribed by the government for Hadley to follow. It is evident from the nature of the itinerary that the choice of routes was his

[3]Appellant's quotations from various Army regulations and statutes (App. Op. Br., pp. 9, 14) do not substitute for evidence of the instructions given Hadley, evidence which was within appellant's power to produce. Such regulations are irrelevant to Hadley's *authority* to return via San Francisco. Moreover, they tend rather to establish that Hadley was on official business, for it is to be presumed that he was free from wrongdoing.

own." (28)[4] On the basis of this evidence, the case is just the same as though Hadley's superiors had specifically directed him to return via San Francisco. It can make no difference that Hadley was traveling on Highway 50 by *authorized choice* rather than by specific direction. Thus, his intention to eat dinner with his mother is immaterial. Yet, appellant did not in the trial Court, and does not even now, attempt to overcome this evidence and the inferences drawn therefrom by the trial Judge. Appellant merely speaks of 60 miles as being "more than a slight deviation as a matter of law." (App. Op. Br., p. 11)[5] In the light of the above evidence, there *was* no "deviation" by Hadley, slight or otherwise.

Further, the trial Judge stated that "the fair and just conclusion [from all the evidence] is that, after leaving Lathrop, Hadley was simultaneously upon the government's business and satisfying his own desire to visit his mother in San Francisco on the way." (28-29)

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[4]This judicial comment is in effect a finding [cf. *Mateas v. Fred Harvey* (C.C.A. 9, 1945), 146 F. 2d 989, 993] and, of course, is in part the basis for the findings made by the trial Judge. Findings may be included in the opinion (Rule 52, as amended in 1947).

[5]In its Conclusion, appellant for the first time suggests that Hadley was off duty at the time of the accident. It claims that this Court can take judicial notice that an "Army day" ends at 4:00 p.m. Even if true, it is immaterial. It does not establish that *Hadley's* day ended at 4:00 p.m., particularly when he was traveling from one station to another, as shown by his itinerary. And even if he were "off duty" he was traveling for his employer's benefit. Second, we deny that an "Army day" ends at 4:00 at all establishments. There are Army offices which work 8:00 a.m. to 5:00 p.m. Third, we dispute that any so-called "Army day" is a proper subject for judicial notice.

The law applicable to such facts is clearly established in California, and elsewhere, to be that

> "[W]here the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master." *Ryan v. Farrell* (1929) 208 C. 200, 204, 280 P. 945 (and cases cited).

Accord:

Westberg v. Willde (1939) 14 C. 2d 360, 372-374, 94 P. 2d 590;

Cain v. Marquez (1939) 31 C.A. 2d 430, 88 P. 2d 220;

Kruse v. White Bros. (1927) 81 C.A. 86, 253 P. 178;

Dennis v. Miller Automobile Co. (1925) 73 C.A. 293, 238 P. 739;

Montgomery v. Hutchins (C.C.A. 9, 1941) 118 F. 2d 661.

This rule was quoted with approval and applied by this Court to a suit under the Tort Claims Act in *Murphey v. U. S.* (C.A. 9, 1950) 179 F. 2d 743, 746.

The authorities cited and discussed by appellant establish no rule contrary to the *Ryan* case, supra, and are easily distinguished on their facts from the case here presented. Appellant's authorities (App. Op. Br., pp. 6-17) involved situations where the em-

ployee was retracing his steps for personal purposes (*Patterson v. Kates* (E.D. Pa., 1907) 152 F. 481) or was driving in a direction opposite from that which would serve his employer's purpose (*Long v. U. S.*, 78 Fed. Supp. 35); or had continued beyond the end of his employer's journey (*Gordoy v. Flaherty* (1937) 9 C. 2d 716, 72 P. 2d 538; cf. *Kruse v. White Bros.* (1927) 81 C.A. 86, 253 P. 178).

Other cases relied upon by appellant are clear cases of deviation from the employer's business (e.g., *Gousse v. Lowe* (1919) 41 C.A. 715, 183 P. 295) or relate to the "going-and-coming-rule" (e.g., *Humphry v. Safeway Stores* (1935) 4 C.A. 2d 589, 41 P. 2d 208) or are cases involving a particular business errand.

Appellant fails to recognize that Hadley was assigned duties which called for traveling over an extensive area, and thus may be considered a "traveling employee", or one with a "roving commission", so that he was within the course and scope of his employment from the time he left one Army base until he arrived at another. See *California Casualty Indemnity Exchange v. I. A. C.* (1936) 5 C. 2d 185, 53 P. 2d 758; *Brown v. Montgomery Ward Co.* (1930) 104 C.A. 679, 286 P. 474, distinguished on these grounds by the *Humphry* case on which appellant relies.

It has thus been shown that there was no "deviation" by Hadley from the course and scope of his employment. He was traveling from one duty station to another by an authorized route, one of the two

main highways to his destination. But even if there were a "deviation", it would at most be a "slight" deviation, insufficient to take him beyond the scope of his employment. Such a question, and the question as to whether he combined personal business with that of his employer under the rule of the *Ryan* case, were questions peculiarly for the trier of fact. [*Thomas v. Slavens* (C.C.A. 8, 1945) 78 F. 2d 144, 147 (collecting many cases)]. These have been resolved against appellant on the basis of ample evidence.

Quite apart from the foregoing, there was evidence to justify the conclusion that Hadley had business in San Francisco to transact with the Finance Office, and on this ground alone was within the course and scope of his employment at the time of the accident. (157-161).

We believe the foregoing to be a complete answer to this aspect of the appeal. It may be helpful, however, to clarify several points appearing in appellant's brief in order that the issue involved not be obscured.

First, the trial Judge did not rely upon any inference (or presumption, as appellant calls it) arising from proof of car ownership and employment at the time of the accident. On the contrary, he expressly declined to decide whether the inference permitted by California law should be drawn in cases of this kind. Other admissible evidence satisfied the Judge that liability existed (26-27). Accordingly, appellant's attempts (App. Op. Br., pp. 6-9) to deny

the permissibility of such an inference cannot establish error in an opinion which expressly refused so to decide.

Second, the trial Judge did not, as stated by appellant (App. Op. Br. p. 10) *assume* that the testimony of Hadley's mother was admissible on the ground that, although hearsay, neither side objected. On the contrary, the opinion clearly states that "we have conducted independent research and are satisfied that the telephone conversation is admissible" because it falls within the "state of mind exception" to the hearsay rule (27). See *Casey v. Casey* (1950) 97 A. C. A. 957, 963, 218 P. 2d 842; *People v. Alcalde* (1944) 24 C. 2d 177, 185 et seq., 148 P. 2d 627. Even if the testimony were inadmissible hearsay, appellant, having offered it and having interposed no motion to strike or objection to appellee's questions, has long since waived any and all objection to the testimony.[6]

We challenge appellant's further statement that without the testimony of Hadley's mother there was no proof that Hadley was in the course and scope of his employment. Hadley's itinerary was in evidence (25, 201-203) and was relied upon by the Court. Appellant did not object to its admission and, in fact, its counsel intended to offer it himself. It was ad-

[6]*U.S. v. Fleming* (C.C.A. 2d, 1943), 134 F. 2d 776, 778; 1 Wigmore on Evidence (3d ed.), § 18. Hearsay may be considered on appeal in support of the trial Court's findings (*Merchants Shippers Assn. v. Kellog Express* (1946), 28 C. 2d 594, 599, 170 P. 2d 923), and is sufficient to support a finding (*Powers v. Board of Public Works* (1932), 216 C. 546, 552, 15 P. 2d 156; *Manney v. Housing Authority* (1947), 79 C.A. 2d 453, 466, 180 P. 2d 69; *In re Plummer* (1947), 79 C.A. 2d 651, 180 P. 2d 771.

mitted by appellant that the automobile was government owned and that Hadley was in its employ at the time of the accident; it was stipulated that he was authorized to use the car *in accordance with the itinerary,* that he left Seattle with the car, drove it to Stockton, and that he was going to drive it back to Fort Lewis, in accordance with the itinerary (204-206).

Third, there is no question in this case as to the application or non-application of California's "Permissive use" statute, to which appellant refers. (App. Op. Br., p. 14.) No California statute has been relied upon by appellees or the trial Court and none has been an issue in this litigation.[7]

III.

THE TORT CLAIMS ACT IS TO BE LIBERALLY CONSTRUED.

Appellant in effect argues for a strict construction of the Tort Claims Act, pointing out its purely statutory character and the right of the plaintiff to sue only by permission of the sovereign.

The Supreme Court of the United States has held, contrary to this argument, that the statute is to be liberally, rather than strictly, construed:

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[7]We suppose appellant has reference to the inference previously discussed (which the trial Court did not pass upon), but such is wholly unrelated to any "Permissive Use" statute. Under such a statute, scope of employment is irrelevant, whereas the inference permitted in California is merely a logical conclusion aiding plaintiff in establishing scope of employment where such is involved, as here.

> "'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" *U. S. v. Aetna Cas. & S. Co.* (1949), 94 L. ed. 151.

It has also been held that "When after many years of discussion and debate Congress has at length established a general policy of governmental generosity toward tort claimants, it would seem that that policy established by the Act should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself." *Spelar v. U. S.* (C.A. 2, 1948), 171 F. 2d 208, 209, cert. granted, 93 L. ed. 1105. Accord: *U. S. v. Fotopulos* (C.A. 9, 1950), 180 F. 2d 631; *Johnson v. U. S.* (C.A. 9, 1948), 170 F. 2d 767; *Employers' Fire Ins. Co. v. U. S.* (C.C.A. 9, 1948), 167 F. 2d 655.

Interspersed in appellant's argument are repeated references to "jurisdiction." "Jurisdiction" and "liability" are coextensive in suits under the Tort Claims Act and nothing is added by talking in terms of "jurisdiction." Appellant is not liable unless the tortious act was done within the course and scope of Hadley's employment, but obviously the trial Court had jurisdiction to decide whether or not it had jurisdiction. [*Stoll v. Gottlieb* (1938), 305 U.S. 165, 171; cf. *U. S. v. Shipp* (1906), 203 U.S. 563]. If the injury was negligently caused within the scope of employment, there is both liability and jurisdiction; if not, it is for most purposes academic whether it is held that there is no jurisdiction, or only that there

is no liability, or both. On the same reasoning which appellant apparently adopts, it could be argued that a Court has no jurisdiction if there is no *negligence*. Clearly, however, negligence is to be tested by the law of the place of injury and not by any federal rule. Thus appellant's attempts to treat this case as raising a jurisdictional question add nothing in the final analysis.

IV.

APPELLEES ARE ENTITLED TO THE INFERENCE THAT HADLEY WAS ON THE BUSINESS OF APPELLANT FROM PROOF THAT HADLEY WAS IN APPELLANT'S EMPLOY AND IN POSSESSION OF AN AUTOMOBILE OWNED BY APPELLANT.

As previously indicated (supra, pp. 14-15), the trial Court did not pass upon the question whether the proof that Hadley was in appellant's employ and in possession of an automobile owned by appellant, gave rise to an inference under the Tort Claims Act that Hadley was acting within the scope of his employment by the United States at the time of the accident. Rather, the trial Court passed this question inasmuch as "other admissible evidence establishes liability." (26-27).

For like reason, it is unnecessary for this Court to decide this question in disposing of the present appeal.

Appellant, however, has chosen to argue the question here, citing *Hubsch v. U. S.* (C.A. 5, 1949), 174 F. 2d 7 (App. Op. Br., pp. 6-9). We are accordingly answering the argument, and will demonstrate that it is manifestly unsound. This Court is, of course, free

to affirm the trial Court upon grounds in addition to those relied upon below.

Commissioner v. Stimson Mill Co. (C.C.A. 9, 1943) 137 F. 2d 286;

Kishan Singh v. Carr (C.C.A. 9, 1937) 88 F. 2d 672;

cf. *J. E. Riley Inv. Co. v. Commissioner* (1940) 311 U.S. 55, 61 S. Ct. 95, 85 L. ed. 36.

As stated by the trial Court, under California law, proof that a car is owned by an employer and that it was in the possession of one who was an employee at the time of an accident, gives rise to an *inference,* and amounts to *prima facie* proof, that the employee was acting within the scope of his employment at the time of the accident. *Westberg v. Willde* (1939) 14 C. 2d 360, 371, 94 P. 2d 590; *Megowan v. Los Angeles* (1936) 7 C. 2d 80, 83, 59 P. 2d 1012; *Shields v. Oxnard Harbor Dist.* (1941) 46 C. A. 2d 477, 487, 116 P. 2d 121; *Bushnell v. Yoshika Tashiro* (1931) 115 C. A. 563, 2 P. 2d 550; And see *Montgomery v. Hutchins* (C.C.A. 9, 1941), 118 F. 2d 661, 664 et seq.; *Dept. of Water & Power v. Anderson* (C.C.A. 9, 1938) 95 F. 2d 577, 583-584, collecting cases. This is also the rule in a majority of other jurisdictions. 9 Wigmore on Evidence (3d ed.) § 2510(a), n. 2.

As held in *Hawthorne v. Eckerson* (C.C.A. 2d 1935) 77 F. 2d 844, 846:

> "[I]t seems clear that, where the car is shown to belong to the defendant and the driver to be a person accustomed to drive it on the defendant's business, there is enough to require the latter to meet the natural inference that at the time of the accident the driver was acting as agent—in other words, in the usual way."

The rule as followed in California has also been held to apply to suits under the Tort Claims Act. *Murphey v. U.S.* (N.D. Cal., 1948) 79 Fed. Supp. 925, rev'd on other grounds, 179 F. 2d 743. See *Clemens v. U.S.* (D. Minn., 1950) 88 Fed. Supp. 971.

The case of *Hubsch v. U. S.,* supra, relied upon by appellant, involved a Florida rule which in its fullest application would require a holding of liability even though the employee were admittedly outside the course and scope of his employment. Such would be in direct conflict with the Tort Claims Act which establishes liability only for acts within the course and scope of employment. The California rule, on the other hand, is merely an aid to the determination of the factual question to be resolved, i.e., course and scope of employment. As such, it is in no way in conflict with, but is fully consistent with, the federal act.

Moreover, the Florida rule discussed in the *Hubsch* case involved a *presumption* whereas the California rule here involved, relates only an *inference*. "A presumption is a deduction which the law *expressly directs* to be made from particular facts" (Cal. Code Civ. Proc. § 1959). An inference, on the other hand, is but "a deduction which the reason of the [trier of fact] makes from the facts proved, *without an express direction* of law to that effect" (Cal. Code Civ. Proc. § 1958).

In addition, any bearing the *Hubsch* decision might have had on the present case was destroyed by the grant of certiorari by the Supreme Court of the United States on October 20, 1949 (94 L. ed. 37)

which, if not a showing that the decision below was wrong (compare a denial of certiorari) at least indicated that the Court considered the question important enough to be reviewed by that high tribunal. After the grant of certiorari the parties negotiated a settlement and the Supreme Court therefore returned the case to the district court without argument, to consider the proposed settlement (94 L. ed. 195).

The inference referred to is permitted by the wording of the Tort Claims Act itself. By its terms it imposes liability on the government under the doctrine of *respondeat superior* "in accordance with the law of the place where the act or omission occurred" and "under circumstances where the United States, if a private person, would be liable" in accordance with the local law. 28 U.S.C.A. §§ 1346(b). It further provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C.A. § 2674.

This Court has decided that inferences drawn under California law must be drawn in suits under this Act. *U. S. v. Fotopolus,* supra [See also *San Diego Gas & Elec. Co. v. U. S.* (C.A. 9, 1949) 173 F. 2d 92, 94, applying the inference of California's rule of *res ipsa loquitur* to a suit under this Act.]

If California law does not control, it is fair to ask, what law does? As between the local law and a "federal common law", we think the statute gives local law

the edge.[8] But, if it is to be a "federal common law", then there is no reason why the federal courts should not adopt the California rule as its own, which, we have shown, is the rule of a majority of jurisdictions. The rule is, after all, merely based upon logic and experience, and fairness to injured parties. (See 9 Wigmore (3d ed.) § 2510a). It is productive of just results. In the present case, for example, appellant was possessed of all the facilities necessary to obtain the maximum amount of information bearing upon Hadley's instructions and authority. Appellees were hardly in an equal position, despite modern discovery procedures. Accordingly, the law recognizes that plaintiffs may prove a *prima facie* case by this inference; if the inference is contrary to the actual fact, appellant has ample opportunity to rebut it, as well as ample facilities for obtaining the facts necessary to do so.

CONCLUSION.

On this, as on any other appeal, the evidence must be viewed in the light most favorable to appellees as prevailing parties below. The facts having been found in their favor, the appellate court "must accept as true all facts which the evidence reasonably tended to prove and plaintiff is entitled to all favorable

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[8]The law of the state of the injury has been held to control in a variety of applications as to the liability of the master for the negligence of the servant. *U.S. v. Eleazer* (C.A. 4, 1949), 177 F. 2d 914, 917; *Olson v. U.S.* (C.A. 8, 1949), 175 F. 2d 510, 512; *Bushey v. U.S.* (C.A. 2, 1949), 172 F. 2d 447, 448 (requiring plaintiff in a Tort Claims case to prove freedom from contributory negligence when such is the state law); *San Diego Gas & Elec. Co. v. U.S.* (C.A. 9, 1949), 173 F. 2d 92, 94 (applying California rule of *res ipsa loquitur*); *U.S. v. Fotopulos* (C.A. 9, 1950), 180 F. 2d 631 (applying inferences drawn under California law).

inferences which may reasonably be drawn from the evidence and circumstances proven." *Railway Express Agency v. Mackay* (C.A. 8, 1950) 181 F. 2d 257, 259.

Appellant has wholly failed to show that the trial Court's findings are clearly erroneous, or even erroneous. Not being clearly erroneous, they are conclusive [*Wasserman v. Perugini* (C.A. 2, 1949) 173 F. 2d 305, 306]. Nor has appellant shown any error of law. The case remains what it has always been, a simple tort suit in which the trial Judge, upon ample evidence, found that appellant's employee negligently injured appellees while acting in the course and scope of his employment. There was no error in that decision.

Dated, Oakland, California,
October 20, 1950.

Respectfully submitted,
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